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In the Supreme Court of the United States

OCTOBER TERM, 1955.

VAN HUFFEL TUBE CORPORATION,
Appellant,
vs.
STANLEY J. BOWERS,
Tax Commissioner of Ohio,
Appellee.

No. 8[illegible]66

THE WEAN ENGINEERING COMPANY, INC.,
Appellant,
vs.
STANLEY J. BOWERS,
Tax Commissioner of Ohio,
Appellee.

No. _____

APPEALS FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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Tax Commissioner of Ohio,
Appellee.

No. _____

APPEALS FROM THE SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

The Appellants, Van Huffel Tube Corporation and The Wean Engineering Company, Inc., in support of the jurisdiction of the Supreme Court of the United States to review these causes on appeal respectfully represent:

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio in the above captioned causes which involve similar questions and were consolidated for appeal, is officially reported at 164 O. S. 209 and unofficially reported in 129 N. E. 2d 467.

Application for rehearing was denied without opinion, by order unofficially reported in 28 Ohio Bar (November 14, 1955) 1114. The opinion of the Court, and the decision of the Board of Tax Appeals which is not reported are set forth in the Appendix.

NATURE OF THE CASES.

These cases are here on appeal from final judgment of the Supreme Court of Ohio. They originated by the timely filing by Appellants with the Tax Commissioner of Ohio under G. C. § 1464-3 of applications for certificates of abatement of so-called franchise taxes or fees illegally and erroneously assessed, overpaid and collected for each of the years 1947 through 1951, aggregating $4,405.56 in the case of Van Huffel and $13,449.90 in the case of Wean due to the inclusion in net worth, against which the taxes were assessed, of the value of United States bonds and interest owned and held by the Appellants, the Supreme Court of Ohio having previously held that such inclusion was improper and not within the statutes of Ohio in six cases (hereinafter generally called the "*Wrenn*" cases) reported under the name of *Wrenn Paper Co. v. Glander, Tax Commissioner,* 156 O. S. 583, 103 N. E. 2d 756, February 13, 1952 (adhered to on rehearing—158 O. S. 15, 106 N. E. 2d 625). On March 10, 1954 the Supreme Court of Ohio in *Fifth-Third Union Trust Company v. Peck, Tax Commissioner,* 161 O. S. 169, 118 N. E. 2d 398 overruled its former decision in the *Wrenn* cases and held that Federal securities are not deductible from the net assets assessed for franchise taxes on domestic corporations. Thereafter on August 17, 1954 the Tax Commissioner denied the applications of these Appellants. The orders of the Tax Commissioner were appealed September 11, 1954 to the Board of Tax Appeals which in turn affirmed by its Consolidated Entry January 4, 1955 upon the basis of *Fifth-Third Union Trust Company v. Peck, supra.* The cases were appealed to the Supreme Court of Ohio which affirmed the orders of the Board of Tax Appeals and these appeals were taken as of right therefrom.

There is no issue as to propriety or timeliness of any of the proceedings.

DATES OF JUDGMENT, ORDER DENYING REHEARING AND NOTICES OF APPEAL.

The judgments of the Supreme Court of Ohio which are here sought to be reviewed were dated October 19, 1955 but did not become final for the purpose of appeal until November 9, 1955 when Appellants' Application for Rehearing was denied. Notice of Appeal was filed within 90 days thereafter as required by U. S. C. Title 28, § 2101 (c)—i.e., on February 4, 1956.

STATUTORY PROVISIONS CONFERRING JURISDICTION.

Jurisdiction of the Supreme Court of the United States to review upon appeal in the instant cases is conferred by Tit. 28 U. S. C. §§ 1257 (2), (3), and 2101 (c). If the appeals should be considered as having been improvidently taken, the Court is requested to consider such appeals as petitions for certiorari under Tit. 28 U. S. C. § 2103.

CASES BELIEVED TO SUSTAIN JURISDICTION.

This Court has jurisdiction on appeal since Appellants timely asserted that the state law as applied violated the federal Constitution and the highest state court rendered judgments against the claim of federal right—*U. S. v. Allegheny County*, 322 U. S. 174, 192, 64 S. Ct. 908, 918.

Since the Ohio statutes were construed in the *Wrenn* cases, 156 O. S. 583, to allow deduction of United States bonds and interest thereon from the property value the net value of which was assessed as against The Wrenn Paper Company, The Gardner Board and Carton Company, The Standard Register Company, The Sorg Paper Company, The Buffalo-Springfield Roller Company and The Steel Products Engineering Company (all domestic Ohio corporations) the same statutes construed in the cases at bar

to deny the right to deduct United States bonds from the tax base for some of the same years (to wit, 1947 through 1950) to Appellants who were also domestic Ohio corporations and followed exactly the same procedure for relief are repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Southern Ry. Company v. Greene*, 216 U. S. 400, 417, *Backus v. Fort Street Union Depot Company*, 169 U. S. 557, 571.

Corporations are persons entitled to the equal protection of the laws under the Fourteenth Amendment—*Southern Ry. Co. v. Greene*, 216 U. S. 400, 417.

The interdiction of the Equal Protection Clause applies to any act of the State—whether of the Legislature in the enactment of statutes, of administrative or executive officers in the enforcement or application of them, or the judicial branch of the Government either in the construction or application of statutes or common law. *Ex parte Virginia*, 100 U. S. 339, 346; *Virginia v. Rives*, 100 U. S. 313; *Southern Ry. Co. v. Greene*, 216 U. S. 400; *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836. The state action proscribed by this clause of the Constitution applies particularly to discriminatory taxation—*Southern Ry. Company v. Greene*, 216 U. S. 400; *Hopkins v. Southern California Telephone Company*, 275 U. S. 393, 48 S. Ct. 180; *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, 48 S. Ct. 553; *Senior v. Braden*, 295 U. S. 422, 55 S. Ct. 800; *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 56 S. Ct. 31; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 679, 50 S. Ct. 451, 454.

Where a timely application for rehearing has been filed, as here, the finality necessary for review by the Supreme Court is deferred until the application is denied or until the power to act upon it has expired—*Chicago G. W. R. Co. v. Basham*, 249 U. S. 164, 166.

STATUTES OF THE STATE INVOLVED HEREIN.

The statutes of the State of Ohio, the validity of which has been sustained by final judgments of the Supreme Court of Ohio as not being repugnant to the Constitution of the United States are the statutes providing for and relating to the assessment of franchise taxes against domestic corporations of Ohio at the rate of one-tenth of one per cent of the net assets of the corporation with certain adjustments but without deduction for United States bonds or interest thereon—particularly General Code §§ 5491, 5495, 5495-2, 5497, 5498, 5499. The pertinent parts of such statutes as well as of G. C. § 1464-3 under which these proceedings originated are quoted in the Appendix. All references are to the General Code applicable to these cases—not to the Revised Code of Ohio which has since become effective.

PROVISIONS OF THE CONSTITUTION AND LAWS OF THE UNITED STATES TO WHICH THE STATUTES OF OHIO AND JUDGMENTS OF THE SUPREME COURT OF OHIO CONSTRUING THEM ARE REPUGNANT.

The Statutes of Ohio as construed and applied by the judgments of the Supreme Court of Ohio in the cases at bar are repugnant to Section I of the Fourteenth Amendment of the Constitution of the United States and to United States Code Title 31, Section 742 (R. S. 3701), the pertinent parts of which are quoted in the Appendix.

QUESTIONS PRESENTED.

Whether the Statutes of Ohio construed and applied to deny exclusion of United States bonds from property of Appellants against the net value of which the tax was assessed do not deny Appellants the equal protection of the laws contrary to Section I of the Fourteenth Amend-

ment to the Constitution of the United States by discriminating against Appellants in favor of other domestic corporations who, following identical procedure, were allowed exclusion of United States bonds from the tax base against which the same tax had been assessed, for the same years.

This question might have been, but was not, raised in *Fifth-Third Union Trust Company v. Peck*, 161 O. S. 169, 118 N. E. 2d 398.

STAGE AT WHICH FEDERAL QUESTIONS RAISED.

The applications of Appellants to the Tax Commissioner for Certificates of Abatement were based on overpayment due to the inclusion of United States Government securities owned when reporting taxable net worth subject to franchise tax.

The Notice of Appeal from the Tax Commissioner to the Board of Tax Appeals, included the following assignments of error:

> "4. Deduction of the value of United States bonds from the tax base for franchise fees or taxes was allowed in the case of other taxpayers for the years 1947-1953 including, without limitation to, The Wrenn Paper Company, The Gardner Board & Carton Company, The Standard Register Company, The Sorg Paper Company, The Buffalo-Springfield Roller Company and The Steel Products Engineering Company;
>
> "5. The statutes of Ohio (as construed and enforced by the order of the Tax Commissioner) and the order of the Tax Commissioner invade the fiscal powers of the United States government, unjustly and illegally discriminate against appellant, deprive it of property without due process of law and deny it the equal protection of the laws, contrary to Section 8 of Article I of, and the Fourteenth Amendment to, the Constitution of the United States and contrary to the

laws of the United States, U. S. Code Title 31, Section 742;

"6. The statutes of Ohio, as construed and enforced by the order of the Tax Commissioner are repugnant to the Constitution and laws of the United States."

Similar assignments of error in the Supreme Court of Ohio were limited to discrimination against Appellants for the four years 1947 through 1950 as compared with the six corporations involved in the *Wrenn* cases, contrary to the Fourteenth Amendment. We quote—

"(3) In the cases of other Ohio corporations, to wit, The Wrenn Paper Co., The Gardner Board & Carton Co., The Standard Register Co., The Sorg Paper Co., The Buffalo-Springfield Roller Co., and The Steel Products Engineering Co., the statutes of Ohio were construed by the Supreme Court of Ohio by its opinion reported in 156 O. S. 583, adhered to on rehearing in 158 O. S. 15, to permit and require the deduction from the tax base for franchise fees or taxes for the years 1945 through 1950, of the amounts of United States bonds with interest thereon owned by such corporations; and the statutes were so applied to such corporations by the Board of Tax Appeals and the Tax Commissioner pursuant to judgment of the Supreme Court.

"The statutes of Ohio (as construed and applied to Appellants herein by the order of the Tax Commissioner and Board of Tax Appeals) and the orders of the Tax Commissioner and Board of Tax Appeals, by denying the deduction of United States bonds held by Appellants with interest thereon from the tax base for franchise fees or taxes for the years 1947-1950 inclusive in the instant cases, unjustly and illegally discriminate against Appellants, deprive Appellants of property without due process of law and deny them the equal protecton of the laws, contrary to the Fourteenth Amendment to the Constitution of the United

States; accordingly, as construed and applied to Appellants with respect to the years involved herein they are repugnant to the Constitution and laws of the United States."

SUBSTANTIALITY OF QUESTIONS INVOLVED.

The statutes of Ohio as construed and enforced by the Tax Commissioner and the Board of Tax Appeals and the Supreme Court for the years 1947 through 1950 unjustly and illegally discriminate against Appellants, deprive them of property without due process of law and deny them the equal protection of the laws contrary to Section I of the Fourteenth Amendment to the Constitution of the United States and in favor of The Wrenn Paper Company, The Gardner Board & Carton Company, The Standard Register Company, The Sorg Paper Company, The Buffalo-Springfield Roller Company and The Steel Products Engineering Company in whose cases the Supreme Court of Ohio in *Wrenn Paper Company, et al. v. Glander, Tax Commissioner,* 156 O. S. 583, construed the same laws for the same years to permit and require deduction of the United States bonds and interest thereon owned by them.

Southern Ry. Co. v. Greene, 216 U. S. 400, 418:

> "* * * We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

A fortiori it would seem clear that to tax two domestic corporations by a different and more onerous rule than

was applied to six other domestic corporations under the same law is a discrimination which denies the equal protection of the laws.

This Court in *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, recognized the principle by its statement (p. 571)—

> "The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

Here, of course, the act did not by its terms give to the other six corporations involved in the *Wrenn* cases certain rights and deny them in terms to the two corporations in the cases at bar; but the act was so construed and applied by the Supreme Court of Ohio in the *Wrenn* cases as distinguished from the cases at bar with the same effect as discrimination by express terms of the act.

The equal protection clause proscribes state action in every form, particularly discriminatory taxation by ruling of every department of the state government whether legislative, administrative, executive or judicial. *Ex Parte Virginia*, 100 U. S. 339, 346; *Virginia v. Rives*, 100 U. S. 313; *Southern Ry. Co. v. Greene*, 216 U. S. 400; *Shelley v. Kraemer*, 334 U. S. 1, 20, 68 S. Ct. 836, 845—

> "State action as that phrase is understood for the purposes of the Fourteenth Amendment refers to exertions of state power in all forms."

Hopkins v. So. Cal. Telephone Co., 275 U. S. 393, 403, 48 S. Ct. 180, 183—

"And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment."

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 399, 400, 48 S. Ct. 553, 554—

"Plaintiff in error was subject to competition in its business by individuals and partnerships operating taxicabs. The act does not apply to them, and no tax is imposed on their receipts. Corporations operating taxicabs are not exempted from any of the taxes imposed on natural persons carrying on that business."

* * * * *

"The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances."

Senior v. Braden, 295 U. S. 422, 55 S. Ct. 800. *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 123, 56 S. Ct. 31, 36—

"* * * The discrimination here disclosed is, however, more obvious than in the case of the other securities mentioned. The Commonwealth of Pennsylvania elected to exempt certain shares of stock of its own corporations because they had already been taxed. It exempted them because to include them in the base would be in effect to tax them a second time. The shares of the Philadelphia National Bank had also been taxed pursuant to R. S. § 5219, and if they were to be treated on an equal footing with shares of domestic corporations the state was bound to afford them a similar exemption from a second exaction."

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 679, 50 S. Ct. 451, 454—

"Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. Ettor v. Tacoma, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."

No question of *stare decisis* is here involved. Although at the outset claims were made for abatement of taxes for the year 1951 as well as for preceding years, the claims for that year were abandoned upon appeal to the Supreme Court of Ohio and the principal amounts involved reduced to $3,662.63 in the case of *Van Huffel* and $8,178.32 in the case of *Wean*, leaving the right to the equal protection of the laws under the fourteenth Amendment as the sole question at issue.

The Supreme Court of Ohio based its decision upon the statement that the equal protection clause of the Federal Constitution does not assure uniformity of judicial decision. This statement without citation was taken from a statement quoted in the decision of the Board of Tax Appeals (*infra*, p. 19) from 12 *Am. Jur.* "Constitutional Law" § 555 at page 250. Only two cases are cited in the footnotes in support of that decision. Neither of them is in point here. In *Milwaukee Elec. Railway and Light Co. v. Wisconsin*, 252 U. S. 100, 106, the Court pointed out that the asserted similarity of the ordinances and conditions involved in the two cases was not clear; nor does it appear that the two cases related to the same period of time.

Backus v. Fort Street Union Depot Co., 169 U. S. 557, 569 involved only the rule of *stare decisis*, not two cases involving exactly the same established facts. It did not involve any question of denial of equal protection of the laws.

Worcester County Trust Company v. Riley, 302 U. S. 292, 58 S. Ct. 185 (1937) is cited on this point in the pocket supplement to 12 *Am. Jur.* That case, however, is not in point. We quote from pages 298-299:

> "Petitioner does not contend that respondents the California officers, propose to do more than invoke the action of its courts to assess a lawful tax and to seek there a judicial determination that decedent was domiciled in California as the basis of its power to impose the tax. Nor is it denied that in so doing they are acting in the performance of official duty imposed upon them by state statutes, which conform to all constitutional requirements. Petitioner's real concern is that the judgment of the California court, if it should decide that decedent was domiciled there, may be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. In any case the Constitution of the United States does not guarantee that the decision of state courts shall be free from error, Central Land Co. v. Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; Tracy v. Ginzberg, 205 U. S. 170, 27 S. Ct. 461, 51 L. Ed. 755; or require that pronouncements shall be consistent."

Here we have no question of differences in proof. We are concerned with two judicial decisions of the same Court in

which the Court applied one construction of law to one group of taxpayers and a contrary construction of the same law to another group of taxpayers with relation to the same tax for the same years without any question of difference in proof or facts.

The case of *Central Land Company v. Laidley,* 159 U. S. 103 involved only a claim of erroneous decision, a question of construction, and no claim of denial of equal protection of the laws or other Constitutional question. Likewise, the case of *Tracy v. Ginzberg,* 205 U. S. 170 involved nothing more than a single decision of the court below involving the ownership of property; the court there held that the claimed erroneous decision would not thereby violate any provision of the Constitutional guarantees of the Fourteenth Amendment.

The situation of Appellants here is identical with that of the six taxpayers involved in the *Wrenn Paper* cases. All are domestic corporations. All initially included in their returns for the years involved the United States government bonds owned by them and later made applications for certificates of abatement on account thereof. Such applications were initially denied by the Commissioner in all cases; but in the *Wrenn* cases, after appeals to the Board of Tax Appeals and to the Supreme Court of Ohio, were finally allowed by action of the Commissioner in accordance with the judgment of the Supreme Court. If the judgments of the Supreme Court of Ohio herein were to stand, they and the statutes as applied would discriminate directly between the cases of Appellants and the taxpayers in the *Wrenn* cases, a clear infraction of the Equal Protection Clause of the United States Constitution.

Since the State court entertained and decided the Federal question, this Court has, and should exercise,

jurisdiction. *Cumberland Coal Company v. Board of Revision*, 284 U. S. 23, 24; 52 S. Ct. 48, 49.

The issue here involved is not so foreclosed (as a contrary decision might have been) by a decision or decisions of this Court as to leave no room for real controversy.

We do not understand that substantiality is a matter of dollars and cents. No issue can be more substantial than the denial of constitutional rights of a litigant such as the denial of equal protection of laws, unless perhaps there be gradations of substance between protection of life and liberty on the one hand and of property rights on the other.

The Constitution can be maintained without destroying or seriously inhibiting the fiscal powers of the State and the fiscal powers can be maintained without serious injury despite enforcement of the constitutional limitations against the *ipse dixit* of the state court.

Respect for the courts and law demands the equal application of the laws to litigants lawfully asserting these rights in the same manner on the same basis of facts within prescribed time, although not prohibiting the application of different laws in different fact situations and not requiring the voluntary extension of such laws to others who do not assert their right to constitutional protection, e.g., the taxpayers who did not appeal, or indeed *Fifth-Third Union Trust Company* whose case (161 O. S. 169) was grounded only on a claimed construction of the law and made no appeal for constitutional protection.

Jurisdiction is also sustainable on treatment of the appeal papers as petitions for writ of certiorari since the Appellants in addition to attacking the statutes of Ohio on the ground of repugnancy to the Constitution attacked the validity of the assessments themselves and the orders of the Tax Commissioner, the Board of Tax Appeals and the judgments of the Supreme Court on the same ground.

Charleston Federal S. & L. Assn. v. Alderson, 324 U. S. 182, 187; 65 S. Ct. 624, 628.

CONCLUSION.

In conclusion Van Huffel Tube Corporation and The Wean Engineering Company, Inc. respectfully submit that the Supreme Court of the United States has jurisdiction of these appeals, but that, if the appeals should be considered as having been improvidently taken, the Court should consider them as petitions for writs of certiorari, all for the reasons stated herein; and pray that the final judgment of the Supreme Court of Ohio be reversed and for such other relief as may be fit and proper.

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APPENDIX.

OPINION OF THE SUPREME COURT OF OHIO, 164 O. S. 209.

VAN HUFFEL TUBE CORPORATION, APPELLANT VS. BOWERS, TAX COMMISSIONER, APPELLEE.

THE WEAN ENGINEERING COMPANY, INC., APPELLANT VS. BOWERS, TAX COMMISSIONER, APPELLEE.

Taxation—Domestic corporations—Franchise tax—Tax base—Value of federal securities owned by corporation—Judicial decisions—Effect of overruling—Retrospective in operation.

(Nos. 34348, 34349—Decided October 19, 1955)

Appeals from the Board of Tax Appeals.

Appellants in the above cases filed with the Tax Commissioner their several applications for certificates of abatement of claimed overpayments of franchise taxes for the years variously from 1947 through 1951. The certificates of abatement were requested on the ground that the value of federal securities owned by appellants had been illegally included in the tax base in determining the franchise tax imposed on appellants for the years in question. Appellants base their claims on the decision in the case of *Wrenn Paper Co. v. Glander, Tax Commr.*, 156 Ohio St., 583, 103 N. E. (2d), 756, contending that the same construction of the franchise-tax law should be applied here as was applied in the *Wrenn* case for the years 1945 through 1950, thus avoiding denying to taxpayers equal protection of the laws: They have abandoned their claims for the year 1951, which year was not involved in that case.

The Tax Commissioner denied the applications on authority of the decision in *Fifth Third Union Trust Co. v.*

Peck, Tax Commr., 161 Ohio St., 169, 118 N. E. (2d), 398, which overruled the *Wrenn Paper Co.*, case, *supra.*

Upon appeals to the Board of Tax Appeals, the several appeals were consolidated for hearing and the orders of the Tax Commissioner were affirmed.

Appeals from the decision of the Board of Tax Appeals bring the causes to this Court for review.

Messrs. Hoppe, Day & Ford, for appellants

Mr. C. William O'Neill, attorney general, and *Mr. W. E. Herron,* for appellee.

Per Curiam. The Board of Tax Appeals was correct in affirming the orders of the Tax Commissioner on authority of the *Fifth Third Union Trust Co.*, case, *supra.* The equal protection clause of the federal Constitution does not assure uniformity of judicial decisions. The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. The one general exception to this rule is where contractual rights have arisen or vested rights have been acquired under the prior decision. The assessment and payment of a tax does not grow out of a contractual relationship, and there is no showing that any rights have become vested in the appellants under such prior decision.

Decision affirmed.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, STEWART, BELL AND TAFT, JJ., concur.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered October 19, 1955, 41 Journal, 595—
Nos. 34348, 34349.)

This cause came on to be heard on the Transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration thereof, it is ordered and adjudged by this Court that the decision of the said Board of Tax Appeals be and the same hereby is affirmed for the reasons stated in the opinion rendered herein.

Ordered, that a special mandate be sent to the Board of Tax Appeals to carry this judgment into execution.

DECISION OF THE BOARD OF TAX APPEALS.

(Dated January 4, 1955.)

These seven appeals have by agreement heretofore been consolidated. They are now so considered for final disposition upon the notices of appeal, the Tax Commissioner's transcripts, the record of a hearing had before this board on October 5 last, certain exhibits, a stipulation of counsel and briefs filed.

The seven appeals are from final orders of the Tax Commissioner denying their several applications for certificates of abatement of claimed overpayment of franchise taxes from the year 1947 up to March 10, 1954, the date of decision of the *Fifth-Third Union Trust Company v. Peck*, 161 O. S. 169.

Appellants contend that since certificates of abatement were issued to The Wrenn Paper Company and five other domestic corporations, joined with it in the cause known as *Wrenn Paper Co. v. Glander*, 156 O. S., 583, by the Tax Commissioner in accordance with the mandate of the Supreme Court, that they, as domestic corporations, are entitled to the same treatment, and that the Tax Commissioner's respective orders unlawfully deny them that

right and deprive them of the equal protection of the law, contrary to the Fourteenth Amendment of the federal Constitution.

If the issue or issues presented depend upon solution of a constitutional question, as appellants' counsel contends, this board is without power and authority to attempt solution of that problem. However, as this board sees it, no constitutional question is here involved.

We first note two facts. Appellants were not parties to the *Wrenn Paper Company* case. Their present position is not affected by any contractual obligation incurred under and by reason of decision of the *Wrenn* case. With these two facts in mind this board proposes to state the reason for its subsequent conclusion herein reached. without citation of authorities upon which such conclusion is founded. We do so for the reason that the principles involved are well and conclusively established.

In 14 *Amer. Jur.*, 345, Sec. 130, the following appears:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former is bad law, but that it never was the law."

This general rule has but one general exception, that being where contractual rights have arisen and vested rights acquired under the prior decision construing the law. See also 11 *Ohio Jur.*, 790, Section 140. It hardly need be said that the assessment of a tax and its payment does not grow out of a contractual relationship either express or implied.

It is equally well settled, as displayed in 12 *Amer. Jur.*, 250, Section 555, that

> "The rule is well settled that the equal protection clause of the Fourteenth Amendment does not assure uniformity of judicial decisions. Thus, the fact that a

court departs from the precedent established by its earlier decisions does not deprive the complaining party of the equal protection of the laws."

The Board of Tax Appeals considers that the orders of the Tax Commissioner herein complained of are not unreasonable and are in accordance with well established law. It follows that upon authority of *Fifth-Third Union Trust Co. v. Peck,* 161 O. S., 169, the Tax Commissioner's orders are affirmed.

PROVISIONS OF THE CONSTITUTION AND STATUTES OF THE UNITED STATES.

Constitution—Article I, Section 8

"§ 8. The Congress shall have power * * *

"To borrow Money on the credit of the United States;"

Constitution—Fourteenth Amendment, Section 1

"§ 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code—Title 31, Section 742

"*Exemption from taxation.* Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." (R. S. § 3701.)

GENERAL CODE OF OHIO.

§ 1464-3. "*Powers, duties and functions of tax commissioners.*

"All other powers, duties and functions of the department of taxation, other than those mentioned in sections 1464-1 and 1464-2 of the General Code, are hereby vested

in and assigned to, and shall be performed by the tax commissioner, which powers, duties and functions shall include, but shall not be limited to the following powers, duties and functions:

"1. To prescribe all blank forms which the department is authorized by law to prescribe, and to provide such forms for the department and distribute same as required by law and the rules of the department;

"2. To exercise the authority provided by law relative to remitting or refunding taxes or assessments, including penalties and interest thereon, illegally or erroneously assessed or collected, or for any other reason overpaid except as provided in paragraph 9, section 1464-1 of the General Code; and, in addition to the authority so provided by law, the tax commissioner shall have authority as follows: On written application of any person, firm or corporation claiming to have overpaid to the treasurer of state, at any time within five years prior to the making of such application but not prior to January 1, 1938, any tax payable under any law which the department of taxation is required to administer, or on his own motion, to investigate the facts and to make, in triplicate, a written statement of his findings; and, if he shall find that there has been an overpayment, issue, in triplicate, a certificate of abatement, payable to the taxpayer or his or its assigns or legal representative and showing the amount of the overpayment and the kind of tax overpaid. One copy of such statement shall be entered on the journal of the tax commissioner, one shall be certified to the attorney general, and one certified copy shall be delivered to the taxpayer. All copies of the certificate of abatement shall be transmitted to the attorney general, and if the attorney general finds the certificate to be correct he shall so certify on each copy, and deliver one copy to the taxpayer, one copy to the tax commissioner, and the third copy to the treasurer of state. Except as provided in sections 5412-1 and 5414-6 of the General Code the taxpayer's copy of any certificates of abatement heretofore or hereafter issued may be tendered by the payee or transferee thereof to the treasurer

of state as payment, to the extent of the amount thereof, of any tax payable to the treasurer of state to the credit of the general fund in the state treasury;"

§ 5491. *"Taxes allocated to 'county poor relief excise fund'; remainder credited to general revenue fund; penalty for failure to pay tax.*

* * * * *

"All remaining excise taxes and all franchise fees or taxes received by the treasurer of state, under the provisions of this act, shall be credited to the general revenue fund. If any public utility fails or refuses to pay, on or before the fifteenth day of December, the tax assessed against it, or if any corporation fails or refuses to pay, on or before the dates or within the time fixed by law, the fee charged against it, the treasurer of state shall certify the list of such utilities or corporations, so delinquent, to the auditor of state, who shall add to the tax or fee due, a penalty of fifteen per cent thereon. The auditor of state shall thereupon forthwith prepare proper duplicates and reports of such taxes and fees and penalties thereon and certify them to the attorney general for collection.

"Thirty days after he receives such duplicates of delinquent taxes and fees and penalties thereon from the auditor of state, the attorney general shall certify to the commission a list of such public utilities and corporations as have failed to pay such taxes or fees and penalties thereon."

§ 5495. *"Fee charged against domestic and foreign corporations.*

"The tax provided by sections 5485 to 5525, both inclusive, of the General Code for domestic corporations shall be the fee charged against each corporation organized for profit under the laws of this state * * * for the privilege of exercising its franchise during the calendar year in which such fee is payable and the tax provided by sections 5485 to 5525, both inclusive, of the General Code for foreign corporations shall be the fee charged against each corporation organized for profit and each corporation not

for profit organized or operating or both in the same or similar manner as corporations not for profit organized under sections 10185 and 10186 of the General Code and 10186-1 to 10186-30, both inclusive, of the General Code, under the laws of any state or country other than Ohio, except as provided herein, for the privilege of doing business in this state or owning or using a part or all of its capital or property in this state or for holding a certificate of compliance with the laws of this state authorizing it to do business in this state, during the calendar year in which such fee is payable."

§ 5495-2. *"Annual report to tax commission; forms; payment of tax upon dissolution or withdrawal.*

"Annually, between the first day of January and the thirty-first day of March each corporation, incorporated under the laws of this state for profit * * * shall make a report in writing to the tax commissioner in such form as the commissioner may prescribe. It shall be the duty of the commissioner to furnish corporations, on request, copies of the forms prescribed by it for the purpose of making such report. No domestic corporation may dissolve, nor may any foreign corporation withdraw or retire from business in Ohio, after January 1st in any year without having made a franchise tax report to the tax commissioner of Ohio, and having paid or secured the tax thereon, for the year in which such dissolution or withdrawal occurs."

§ 5497. *"Contents of annual report.*

"The annual corporation report shall include statements of the following facts as of the date of the beginning of the current annual accounting period of such corporation:

"1. The name of the corporation;

"2. The name of the state or country under the laws of which it is incorporated;

"3. The location of its principal office and, in the case of a foreign corporation, the location of its principal place

of business in this state and the name and address of the officer or agent of the corporation in charge of the business in this state;

"4. The names of its president, secretary and treasurer, with the postoffice address of each;

"5. The nature and kind of business in which such corporation is engaged;

"6. The date of the beginning of the current annual accounting period of the corporation;

"7. The amount of its capital, surplus, whether earned or unearned, undivided profits and reserves, as shown by the books of the corporation. A complete schedule shall be filed with the report showing the object and amount of each such reserve; also there shall be filed with said report a schedule of the annual rates of depreciation and depletion;

"8. The location and value of the property owned or used by the corporation as shown on its books, both within and without the state, given separately; and the total amount of business done and the amount of business done within the state by said corporation during its preceding annual accounting period, given separately. Business done within this state by domestic corporations shall include all business except extra-state business;

"9. The value of the good will of the corporation as shown on its books if carried thereon as an asset."

§ 5498. [*Determining the value of the outstanding shares of stock and intangible property; certification to auditor of state.*]

"After the filing of the annual corporation report the tax commission, if it shall find such report to be correct, shall on or before the first Monday in May determine the value of the issued and outstanding shares of stock of every corporation required to file such report. Such determination shall be made as of the date shown by the report to have been the beginning of the then current annual accounting period of such corporation. For the purpose of

this act, the value of the issued and outstanding shares of stock of any such corporation shall be deemed to be the total value, as shown by the books of the company of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of (a) Proper and reasonable reserves for depreciation, and depletion as determined by the tax commission, (b) taxes due and payable during the year for which such report was made, (c) the item of good will as set up in the annual report of the corporation when said annual report is accompanied by certified balance sheet showing such item of good will carried as an asset on the books of the company (such balance sheet shall not be deemed a part of the public records, but shall be a confidential report for use of the commission only), and (d) such further amount as upon satisfactory proof furnished by the corporation, the tax commission may find to represent the amount, if any, by which the value of the assets (other than good will) of the corporation as carried on its books exceeds the fair value thereof. Claim for the deduction of such difference must be made by the corporation at the time of filing its report. The commission shall then determine as follows the base upon which the fee provided for in section 5499 of the General Code shall be computed. Divide into two equal parts the value as above determined of the issued and outstanding shares of stock of each corporation filing such report. Take one part and multiply by a fraction whose numerator is the fair value of all the corporation's property owned or used by it in Ohio and whose denominator is the fair value of all its property wheresoever situated in each case eliminating any item of good will; take the other part and multiply by a fraction whose numerator is the value of the business done by the corporation in this state during the year preceding the date of the commencement of its current annual accounting period and whose denominator is the total value of its business during said year wherever transacted.

"In determining the amount or value of intangible property, including capital investments, owned or used in

this state by either a domestic or foreign corporation the commission shall be guided by the provisions of section 5328-1 and 5328-2 of the General Code except that investments in the capital stock of subsidiary corporations at least fifty-one per centum of whose common stock is owned by the reporting corporation shall be allocated in and out of the state in accordance with the value of physical property in and out of the state representing such investments.

"On the first Monday in June the tax commission shall certify to the auditor of state the amount determined by it through adding the two figures thus obtained for each corporation."

§ 5499. "[*Fee charged for collection; exception; statement to corporation; fee payable to treasurer; penalty for failure to pay fee.*]

"On or before June 15th the auditor of state shall charge for collection from each such corporation a fee of one-tenth of one percent, upon such value so certified and shall immediately certify the same to the treasurer of state * * *. But in no case shall the fee be less than twenty-five dollars.

"Promptly upon receipt of the certificate of the auditor of state the treasurer of state shall mail to each corporation at its principal office in the state of Ohio, or to such person in the state of Ohio as the corporation may designate in its report, a statement showing the value or the proportionate value of the shares of stock upon which such fee is charged and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the fifteenth day of the following July. If such fee is not paid on or before that time a penalty shall attach thereto as is provided in section 5491 of the General Code. But no penalty shall attach prior to the expiration of thirty days from the date of the mailing of the statement by the treasurer of state."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

VAN HUFFEL TUBE CORPORATION,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

THE WEAN ENGINEERING COMPANY, INC.,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

No. 878.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee in the above entitled cause, for his statement in opposition to appellants' statement as to jurisdiction herein and in support of appellee's motion to dismiss or affirm, respectfully states the following:

I.

STATEMENT OF ISSUE ON APPEAL.

The appellants are corporations organized under the laws of Ohio. The appellants filed with the Tax Commissioner of Ohio applications for certificates of abatement for overpayment of franchise taxes for the tax years 1947 through 1951 on the ground that the value of federal securities had been illegally included in the computation of the franchise tax formula for said tax years. The value of these United States securities was included in the tax base, set up by Section 5733.05, Revised Code of Ohio, in arriving at the Ohio corporation tax due from appellants.

Appellants based their claims on the decision of the Ohio Supreme Court in the case of *Wrenn Paper Co. v. Glander, Tax Commr.*, 156 Ohio St., 583, 103 N. E. (2d), 756. The case of *Wrenn Paper Co. v. Glander, Tax Commr., supra,* was overruled by the Supreme Court of Ohio by its decision in *Fifth Third Union Trust Co. v. Peck, Tax Commr.*, 161 Ohio St., 169, 118 N. E. (2d), 398. The *Wrenn Paper* case concerned certificates of abatement for the tax years 1945 to 1950, inclusive, and was decided February 13, 1952. The *Fifth Third* case concerned certificates of abatement for the years 1947 to 1951, inclusive, and was decided March 10, 1954.

Appellants contended before the Supreme Court of Ohio that the same construction of the franchise tax law should be applied to them as was applied in the *Wrenn Paper* case on the grounds that to do otherwise would be to deny them the equal protection of the law.

The Supreme Court of Ohio in 164 Ohio St., 209, 129 N. E. (2d), held the following in a short per curiam opinion:

> "The Board of Tax Appeals was correct in affirming the orders of the Tax Commissioner on authority of the *Fifth Third Union Trust Co.* case, *supra.* The equal protection clause of the federal Constitution does not assure uniformity of judicial decisions. The general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. The one general exception to this rule is where contractual rights have arisen or vested rights have been acquired under the prior decision. The assessment and payment of a tax does not grow out of a contractual relationship, and there is no showing that any rights have become vested in the appellants under such prior decision."

The appellants now seek to invoke the jurisdiction of this court contending that the decision below violates Section 1 of the Fourteenth Amendment to the Constitution of the United States in that it denies them equal protection of the law and is repugnant to United States Annotated, Title 31, Section 742 (R. S. 3701).

II.

THE DECISION OF THE OHIO SUPREME COURT IS NOT VIOLATIVE OF ARTICLE I, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES NOR 31 U. S. C. A., SECTION 742.

This contention of the appellants does not raise a substantial federal question as it appears that this court in its recent decisions has completely answered this contention.

This same contention was made in the appeal of *Raymond Bag Co. v. Stanley J. Bowers, Tax Commissioner of*

Ohio, which appeal was dismissed by this court on April 2, 1956, for want of a substantial federal question.

On March 26, 1956, this court decided the case of *Werner Machine Company, Inc., v. Director of Division of Taxation, Department of the Treasury, State of New Jersey*, 76 S. Ct., 534. On page 535 of the per curiam opinion this court held as follows:

> "* * * This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, e.g., Society for Savings v Coite (US) 6 Wall 594, 18 L ed 897; Provident Institution v Massachusetts (US) 6 Wall 611, 18 L ed 907; Hamilton Mfg. Co. v Massachusetts (US) 6 Wall 632, 18 L ed 904; Home Ins. Co. v New York, 134 US 594, 33 L ed 1025, 10 S Ct 593, supra; Educational Films Corp. v Ward, 282 US 379, 75 L ed 400, 51 S Ct 170, 71 ALR 1226, supra; Pacific Co. v Johnson, 285 US 480, 76 L ed 893, 52 S Ct 424, supra. * * *"

It would seem to be no longer a debatable question that an excise tax such as the Ohio franchise tax, which remains the same whatever the character of the corporate assets, does not discriminate against federal obligations and is not violative of Section 3701, R. S., 31 U. S. C. A., Section 742.

III.

THE DECISION OF THE OHIO SUPREME COURT DOES NOT DENY APPELLANTS EQUAL PROTECTION OF THE LAWS CONTRARY TO SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The appellants contend that to apply to them the law as construed by the Ohio Supreme Court in the case of *Fifth Third Union Trust Co. v. Peck, Tax Commr.*, 161 Ohio St., 169, 118 N. E. (2d), 398, would be to deny the appellants the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

In the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S., 358, the following was stated in the opinion of the court delivered by Mr. Justice Cardozo at pages 364 and 365:

> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. * * * On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. * * *"

In 11 *Ohio Jurisprudence*, Courts, Section 140, page 790, it is stated:

> "Where a rule is changed by judicial decision, the new rule operates both prospectively and retrospectively. * * *"

See also *City of Sidney v. Cummins*, 93 Ohio St., 328.

The cases of this court relied upon by the appellants to support jurisdiction of this court are not cases where the state court had overruled its former decision but cases where the laws the state court held valid discriminated. The Ohio court is not saying one person or class is to be treated different than another person or class but is saying that it was erroneous in its first decision and now has declared the law applicable to all.

The appellants quote from *Backus v. Fort Street Union Depot Co.*, 169 U. S., 557, at page 571. This court said further at page 571:

> "* * * And a similar thought controls where the courts of the State have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws."

This court has repeatedly held that the fact that a state court has overruled doctrines established by a previous decision on which a party relied does not give rise to a claim under the Fourteenth Amendment to confer appellate jurisdiction on this court. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S., 673, 680; *Tidal Oil Co. v. Flanagan*, 263 U. S., 444; *Fidelity & Columbia Trust Co. v. City of Louisville*, 245 U. S., 64; *Lombard v. West Chicago Park Commissioners*, 181 U. S., 33.

IV.

NO SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THE APPEAL.

Clearly, the Ohio corporations tax is an excise on the privilege of exercising corporate franchise and the inclusion of the value of federal securities in arriving at the book value of the issued and outstanding stock of a corporation, the measure used to compute the franchise tax, is violative of neither Article I, Section 8, of the Constitution of the United States nor 31 U. S. C. A., Section 742.

Further, there is no violation of the Fourteenth Amendment to the Constitution of the United States by the application of the last pronouncement of the state court of the law to the appellants' case even though the last pronouncement overrules a prior decision on which appellants rely.

It is submitted, therefore, that the appellants have failed to raise a substantial federal question.

MOTION TO DISMISS OR AFFIRM.

For the foregoing reasons and based upon the foregoing authorities, this appellee moves that the court dismiss the appeal of these appellants or affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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